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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

ROSS KOTAKES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN KAPPOS
Chapel Square, Suite 116
7863 Broadway
Gary, Indiana 46410
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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Petitioner, Ross Kotakes, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Indiana, Hammond Division.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported, but is printed in the Appendix to this Petition (Appendix A).

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1971, Appendix A. A Petition for Rehearing was denied by an order entered April 6, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Where the defendant was charged in a two-count indictment, the first count of which charged transporting of a woman on January 7, 1968 in interstate commerce for the purpose of prostitution, from Gary, Indiana, to Louisville, Kentucky, and the second count charged the same offense in the same language except that the offense was on or about January 12, 1968, and the transportation in interstate commerce was between Louisville, Kentucky and Gary, Indiana, and the evidence disclosed that one Marian Chadwick was the only woman involved in both trips, and the jury found the defendant "not guilty" as to the initial interstate travel as charged in Count I, but did find him "guilty" of the return travel as charged in Count II of the indictment, did the Court err in denying the defendant's motion for acquittal notwithstanding the verdict as to Count II?

2. Did the court err in denying the defendant's motion for acquittal as to Count II for insufficiency of proof beyond a reasonable doubt?

STATUTE INVOLVED

Title 18, U.S. Code 2421

"Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or

Whoever knowingly procures or obtains any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby such woman or girl shall be transported in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States—

Shall be fined not more than $5,000 or imprisoned nor more than five years, or both. June 25, 1948, c. 645, 62 Stat. 812, Amended May 24, 1949, c. 139 § 47, 63 Stat. 96."

STATEMENT OF THE CASE

Nature of the Case and its Disposition

This is an appeal from a conviction as to Count II of a two-count indictment, after trial before a jury.

The indictment was returned on October 15, 1969, and the first count charged that "On or about the 7th day of January, 1968, in the Northern District of Indiana, Ross Kotakes did knowingly transport in interstate commerce from Gary, State of Indiana, to Louisville, State of Kentucky, a woman, for the purpose of prostitution, debauchery and other immoral purposes, in violation of Section 2421, Title 18 of the United States Code."

The second count charged the same offense in the same language except that the date of the offense was on or about January 12, 1968, and the transportation of interstate commerce was between Louisville, Kentucky to Gary, Indiana (A. 5).

At the close of the government's evidence, (Tr. p. 209), the court denied the defendant's motion for acquittal and his renewed motion at the close of all evidence (A. 113).

The jury, on February 27, 1970, returned a verdict of "not guilty" as to Count I, and of "guilty" as to Count II (A. 19).

The defendant on March 4, 1970, filed his motion for judgment of acquittal as to Count II of the indictment notwithstanding the verdict (A. 20), which was denied by the Court.

On April 10, 1970, the court sentenced the defendant to two years imprisonment.

The Evidence

MARIAN O'RITA CHADWICK, called as a witness by the government, in substance testified as follows: She lives in Fort Lauderdale, Florida and is employed as a waitress. First met Kotakes on December 23, 1967, at the Villardo Hotel in Gary, Indiana. On January 6th or 7th, of 1968, she worked for him as a prostitute at the Villardo Hotel. On January 6th or 7th, 1968, she went from Gary, Indiana to Louisville, Kentucky in an automobile owned by Kotakes and on and off driven by him during the trip. In addition to her and Kotakes, Gary Goff, two of his girls, Dee Dee and Ruth, Johnny Corn and Kotakes' girl friend Tina also accompanied them (A. 125-127). She further testified as follows:

"Q. Prior to your going to Louisville, did you ever have a conversation with Mr. Kotakes as to the purpose of your trip?

A. Not until just before we left. We were going down there for a convention, to work a convention.

Q. By working a convention, what do you mean?

A. Acting as call girls.

Q. Did you in fact work as a call girl in Louisville, Kentucky?

A. Yes, sir.

Q. By this are you telling me you engaged in sexual intercourse with men for money?

A. Yes, sir."

She remained in Louisville, Kentucky for about five days and gave her money to Kotakes. She met Sam and James Weidner and had sexual relations with both of them for money. Kotakes, Tina and herself occupied one room (A. 127-129).

Then she testified as follows:

"Q. Did there come a time when you left Louisville?
A. Yes, there was.
Q. When you left Louisville, where did you go?
A. Back to Gary, Indiana, at the Villardo Hotel.
Q. How did you travel?
A. By car, the same way as we went down.
Q. Whose car was it?
A. Ross Kotakes'.
Q. Did Ross Kotakes ride in the automobile with you?
A. Yes.
Q. Did he drive?
A. On and off.
Q. With whom did he share the driving?
A. Gary Goff.
Q. When you returned to Gary, what did you do?
A. Went to work at the Villardo.
Q. This is the same location that you worked at prior to going to Louisville?
A. Yes, sir.
Q. What did you do there, at the Villardo?
A. Worked as a call girl or as a prostitute.
Q. Did you receive proceeds for sexual intercourse?
A. Yes, sir.
Q. What did you do with the funds?
A. Gave the money to Ross." (A. 129-130).

She was sold to Kotakes by Gerry Goff, and money exchanged between them in the sum of $3,000.00, on December 23, 1967. She then went to Las Vegas with Kotakes and Tina and she started working for Kotakes when she returned from that trip. She saw Jim Weidner at the Villardo. She stopped being a prostitute in April, 1968 (A. 131-133).

On cross examination Chadwick testified in substance as follows:

She is 21 years old, never been married and had a baby girl on October 19, 1969. She came to Gary at the beginning of December, 1967, from Benton Harbor, Michigan and was brought to Indiana by Gerald G ff and Mike Overmeyer. She was forced by Goff to work as a prostitute at the Venus Cafe. Never set foot outside of Venus Cafe until Goff took her to the Villardo Hotel (A. 133-137). While she was at the Venus Cafe she did go out with Goff at 4:00 o'clock in the afternoon to a store where there were other customers. She did not make any attempt to tell the customers that she was being kept against her will (A. 145-147). She saw Jim Craft give Kotakes $183.00 but did not tell the F.B.I. on June 4, 1968 that she saw the exchange of money because she didn't remember it then, but remembers it now (A. 149-150). The only time she really made any attempt to get away, she succeeded (A. 150-152). Does not remember testifying at the Goff trial (few months prior to Kotakes trial) that she had to take a trip from Indianapolis to South Bend. She further testified as follows:

"Q. During the times and days that you have testified about those occurrences, you did have an opportunity to take a bus trip from Indianapolis to South Bend, did you not?

A. Yes, sir—not from Indianapolis to South Bend, no.

Q. Pardon me. From—was it from South Bend to Indianapolis?

A. No, sir, I never went from Indianapolis to South Bend on a bus.

Q. Did you take a bus trip?

A. Just coming back from Evansville, and that was when I was with Jim Craft.

Q. What year was that, or month?

A. This was in 1968, the latter part of February or early part of March.

Q. Did you testify in the Goff trial, a few months ago, that you did have a—take a trip from Indianapolis to South Bend?

A. Not that I recall, no, sir.

Q. Referring your attention to the trial again, of April 7, 1969, were you, while under oath in this court room, asked the question:

'You never did try to run away from Villardo Hotel?

'Answer: I had no chance to.

'Q. What about the bus trip from Indianapolis to South Bend; why didn't you run away then?

'A. I have no idea.'

A. I never took a bus trip from Indianapolis to South Bend, not while I was with Ross Kotakes or with—

Q. I'm asking you: Did you give that answer?

A. Not that I recall, sir, no." (A. 152-153).

(Transcript of the above exchange in the trial of Goff was read to the jury and admitted in evidence as defendant's Exhibit G. (A. 124).

When Goff took her to the Villardo she saw the exchange of $3,000.00 in her presence and in her statement of June 4, 1968, she so advised the F.B.I. (A. 157).

She further testified as follows:

"Q. I believe you stated on your direct examination that when Mr. Goff took you to the Villardo on December 23rd or 24th, there was some exchange of money?

A. Yes, sir; yes, sir.

Q. How much?

Mr. Kimbrough: Your Honor, I'm going to object. He's asked the question. It's been answered, I think, two or three times.

The Court: No, objection overruled.

Mr. Kimbrough: Excuse me.

Q. How much?

A. Approximately $3,000.00.

Q. In your presence?

A. Yes.

Q. Now you also told the F.B.I. that you saw that exchange of $3,000.00, and you told them that in your statement of June 4, '68, is that correct?

A. Yes.

Q. Now, going back to the trial of April 7, 1969, was this question asked of you?

'Miss Chadwick, at the time you went with Mr. Goff to the Villardo Hotel, at the time you met Ross, did you ever see any money exchange hands?

'A. No, sir.'

Did you give that answer?

A. Yes, sir, I did.

Q. Well, which is it; did you or did you not?

A. I did not see the money exchange hands. It was what was told to me." (A. 156-157).

In regard to going to Las Vegas she testified that it was not really voluntary (A. 159).

Further she stated:

"Q. And on the 23rd and 24th then, you considered yourself as working for Ross?

A. Yes, sir, after Goff left.

Q. How did you find that out?

A. Because I was told.

Q. Who told you?

A. Ross and Gerry Goff, both.

Q. Did that happen on the first day that you went to the Villardo, the 23rd or 24th?

A. After everything was done, yes.

Q. Are you sure about that, Miss Chadwick?

A. Yes, I'm very sure that I was told then.

Q. All right. Let's go back to the trial of April 7, 1969. Were you asked the following question?

'Q. Can you relate what Mr. Goff said about the transaction?

'A. Mr. Goff just said I would be working for Gerald Goff and there was no mention of money at the time. The evening of the 23rd and 24th, there was no mention of money whatsoever, and Ross just asked me if I would like to go to Las Vegas with him and Tina for a couple of days or over Christmas, and I agreed.'

Next question:

'Excuse me. Mr. Goff told you that you would be working for him?

'A. Yes, but it wasn't until after we got back from Las Vegas that Ross told me.'

Did you give that testimony in April 9th?

A. Yes, sir; but the difference is he didn't tell me about the money that I owed him until after we came back from Las Vegas . . .

Q. Miss Chadwick, from what I read you here, what you heard, is it true; did you make those statements in open court here?

A. Yes, sir (A. 161-162).

Q. My question, Miss Chadwick, is as follows: that at the other trial, you did not say that. I will read it again to you for your benefit, if you will listen carefully, please.

The question was:

'Can you relate what Mr. Goff said about the transaction?'

And your answer was:

'Mr. Goff just said I would be working for Gerald Goff and there was no mention of money at the time. The evening of the 23rd or 24th, there was no mention of money whatsoever, and Ross (Kotakes) just asked me if I would like to go to Las Vegas with him and Tina for a couple of days or over Christmas, and I agreed.'

'Excuse me, Mr. Goff told you that you would be working for him? Meaning Mr. Goff.

'A. Yes, but it wasn't until after we got back from Las Vegas that Ross told me.'

Isn't that what you said?

A. Well, how can I work for Mr. Goff when I was with Mr. Kotakes?

I may have said that, but that doesn't make sense.

How can I work for Mr. Goff when Mr. Goff already exchanged me over to Ross?'' (A. 163-164)

She was not locked up at the Villardo and she was in good health. Ruth and Dee Dee were Gerald Goff's girls and she used to refer to them as sisters-inlaw (A. 165-167). She was not under lock and key at the Holiday Inn in Louisville, Kentucky, and did not attempt to run away. She was scared to death of Kotakes in Louisville, Kentucky since he beat her *after* they returned to Gary from Louisville, Kentucky. She did like Goff at one time (A. 168-170). Jim Weidner came to the Villardo because she asked him to and he had asked her to marry him in Louis-

ville. When he came to the Villardo he was married but he still asked her to marry him (A. 172-173). She was brought in to a Juvenile court at the age of 13 and was confined to a girl's school (A. 175).

ROBERT L. STEPHENS, called as a witness for the government, in substance testified that he is custodian of the registration records of the Holiday Inn, South, in Louisville, Kentucky, and identified government's exhibit "I", being a registration card from Ross Kotakes for January 7, 1968. That the records further show check-out on January 12, 1968. Registration called for three persons. They had a studio room or a room where a group could get together (A. 181-188).

SAMUEL VICTOR WEIDNER, called as a witness by the government testified that he is a sales manager for Monarch Houses and in January, 1968, he was in Louisville Kentucky for the Mobile Home Show. He met Chadwick at the Holiday Inn and paid directly to her $30.00 to go to bed. He believed that he did meet a person known as Ross who resembles the defendant. On cros-examination he testified that his brother introduced him to Chadwick and he had no conversation with Ross except that Ross asked him if he liked to play cards (A. 189-192).

JAMES WEIDNER, called as a witness for the government testified that he was a Sales Manager for the Monarch Homes and in January, 1968, he attended the National Mobile Home Show in Louisville, Kentucky. He met Chadwick at the Holiday Inn and knew her to be a prostitute and gave her $30.00 to go to bed. He met Kotakes in Louisville and had no conversation with him concerning Chadwick in Louisville (A. 193-195). A month afterwards

he saw Chadwick at the Villardo Hotel in Gary, Indiana, because she told him she wanted to get out of prostitution. He went to Gary to pick her up and take her away. Kotakes said she owed him $600.00, and if paid he could take her with him (A. 197-199). On cross-examination he testified that he is married and has nine children; that he is thirty-five years old and was not married on January 8, 1968, but that he was separated, for about a couple of months just before going to the Louisville show, but was living in the same home with his wife. He had intercourse for $30.00 each time with Chadwick (A. 200-202). He did not introduce Chadwick to his brother (A. 203). He was not aware that he was violating the law in Kentucky when he offered her $30.00 to go to bed. He did not ask Chadwick to marry him in Louisville. He did ask her to marry him in February at the Villardo. He thought quite a bit of her, and did ask her to marry him even though he was married but separated and living in the same home with his wife. The reason that he saw her at the Villardo in 1968 was that he was coming to Chicago and stopped to see her. She did not call him. Ross did and told him to come and get her (A. 204-207). He told her he loved her and wanted to marry her and was still separated from his wife. There was no doubt in his mind that the statements he had made were true and correct. He did make a statement to the F.B.I. on January 27, 1969, that he received a call from Ross claiming that Marian (Chadwick) wanted to live with Weidner but he had been reunited with his wife and he advised Ross that he did not want to have any further contact with Marian. He did not testify previously that he was separated from his wife when he went to see Chadwick in February, 1968 (A. 207-208).

ROSS KOTAKES, on his own behalf testified as follows:

That he was born in Gary, Indiana on April 7, 1926, and finished 8th grade and because of mother's illness and father's poor job he had to quit and go to work for the E.J.&E. Railroad until 1943, at which time he enlisted in the U.S. Navy. Participated in action at European and Pacific theaters and received three Bronze Stars and One Silver Star. Received an honorable discharge in February, 1946. Received third degree burns as a result of an explosion of rockets and was hospitalized about five months. He is receiving a 10% disability (A. 29-32). Upon discharge came back to Gary and went to work at the E.J. &E. Railroad. Also attended VA approved school for Diesel and Gas Engine Mechanics. With the exception of 5½ months that he spent in Hollywood, Florida, on recommendation of a physician to relieve pain for service-incurred burns, he has been consistently employed, mainly by an auto agency. He left Gary for about two years to operate a restaurant in Philadelphia, then returned to Gary and started his own used car business and two years after he bought a building together with a realtor and operated a grocery store and sometime in November, 1965, together with a realtor and the Vice-President of a local bank he bought the Villardo Motel, 3450 West 4th Avenue, Gary, Indiana, and he was the only person charged with maintenance, desk clerk, and enlarged the place from 17 rooms to 30 rooms (A. 32-38). He met Gerry Goff in July, 1967, as a customer at the Villardo. He had lent $200.00 to Gerry Goff in July, 1967, and was repaid. He also lent him $250.00 a few weeks later and was also repaid. Met Chadwick on December 21st or 22nd of 1967, when Gerry Goff came with her and rented a room and introduced her as Hope Fain (A. 38-41).

Gerry Goff told him in the presence of Chadwick that he would have to leave her at the Villardo over the holidays since he had some problems with some other girls and would appreciate if he would assist her. He told Goff that he was leaving for Las Vegas and would not be there for the holiday. Goff asked him if he would mind taking Chadwick with him. He asked his girl friend who already knew Chadwick and she had no objections and called for reservations for Chadwick and Goff agreed to pay her expenses. Returned to Gary from Las Vegas in about five days (A. 41-44). Upon returning to Gary, she stayed at the room that Goff had rented and was not under any restraint. She had access to a telephone and called Benton Harbor, Michigan (telephone bill admitted as defendant's exhibit "A"). Goff was at the Villardo Motel on December 31, 1967, and had with him two girls named Ruth and Dee Dee. Chadwick stayed with Goff in Goff's room (A. 41-50). He made a trip to Louisville, Kentucky on or about the 6th day of January, 1968, to go to the Mobile Home convention. Had an interest in Mobile Homes since 1965, and anticipated buying and selling mobile homes and having sites available for that purpose at 3450 West 4th Avenue, Gary, Indiana. Letter from Driftwood Homes as a response to an inquiry made by the defendant for mobile homes dated January 18, 1966, and other correspondence to like effect, marked exhibits B, C, D and E were offered in evidence and not admitted over objections on the grounds that they were not material or relevant (A. 51-52). Made calls to Elkhart in regard to trailer homes and was told about the convention in Louisville in January, 1968. Goff was interested in buying a trailer and he was to have come to Louisville in his own car, but the day that they were to leave Gary, Goff's car did

not start and he with Chadwick, Ruthie and Dee Dee asked to go in Kotakes' car. John Montagano, a friend of Kotakes and Kotakes' girl friend Tina also went. He did not ask Ruthie, Dee Dee or Chadwick to come along. Gerry Goff asked them (A. 53-54). Upon arriving in Louisville they checked into the Holiday Inn and Gerry Goff asked if Chadwick could stay in the room that Kotakes and Tina were occupying inasmuch as she did not get along with Ruth and DeeDee. Kotakes went around to the trailer convention and received a pass from one Francis Capitelli. Kotakes talked to manufacturers and made inquiries as to Mobile Homes and visited the displays which were held at the Kentucky Derby grounds. At the Brown Hotel he met a man he knew from Gary who represents a manufacturing company. There were never any conversations with Goff in December, 1967, in regard to $3,000.00 or any conversation in regard to payment to Goff from Kotakes for Marian Chadwick. Marian Chadwick never gave him any money in Louisville. She did give him money before she left the Villardo Motel on or about the 14th day of February, 1968, the sum of $64.00, plus sales tax representing rentals. Never asked Chadwick to engage in prostitution in Louisville, Kentucky, or in any other place. After four or five days, he drove back to Gary from Louisville with the same people. Goff, DeeDee, Chadwick and Ruthie stayed at the Villardo Motel for a few days (A. 54-58). It is not true that a man named Craft gave Kotakes money so that he could take Chadwick with him. She left the Villardo in February, 1968, with Craft. After returning from the Mobile Homes Convention he still had an interest in mobile homes and made inquiries of Riley Mobile Homes sometime in the spring of 1968 (A. 58-60).

On June 6, 1968, he applied for a change of zoning in the property known as the Villardo Motel to allow the construction of a trailer court, copy of which was marked Exhibit "F" and admitted to evidence. He never beat, struck or in any way hurt Marian Chadwick (A. 61-65).

On cross-examination, in substance, he testified as follows: At the time he first rented rooms to Goff, he did not know of his profession. He now knows that he handled prostitutes. On the 22nd or 23rd of December, 1967, Goff was registered as a guest of the motel and he still has the registration record. Marian Chadwick did not register (A. 65-70). He met his girl friend Tina in June, 1967. He knew that Tina had been a prostitute. He now is in love with her. He suspected in December, 1967 that Goff was a pimp (A. 70-73). Goff took with him to Louisville, Chadwick, Ruth and DeeDee. He never talked to Goff about prostitutes or prostitution. Tina never worked as a prostitute at the Villardo Motel (A. 73-74). Tina gave him $2,000.00 over two and a half years because he had paid for her operation and medical bills. She worked at the Villardo as a desk clerk during that time and paid him back the approximate sum of $2,000.00 that he had advanced for her operations. Tina did not practice prostitution in Louisville, Kentucky, and as far as he knew Marian Chadwick did not practice prostitution in Louisville, Kentucky (A. 76-84). After they left Gary and by the time they arrived in Louisville, Kentucky, Chadwick, Ruth and DeeDee were bickering in regards as to where Marian was going to stay and Tina and Kotakes decided to take her in their room (A. 85). He has seen Montagno, also known as Johnnie Corn, gamble in Louisville. He played poker with him three or four times. Montagno is from Elkhart, Indiana and he knows an awful lot of

manufacturing people of trailer homes and he introduced him to several. He asked Montagno to go to Louisville and introduce him to manufacturing people. While in Louisville he played Gin Rummy with Montagno but not for money (A. 87-91). Chadwick never told him anything about her activities as a prostitute. He doesn't know why Chadwick would lie. He never received any money from Chadwick as a result of her prostitution and she left Villardo of her own free will on February 14, 1968, with Jim Craft. When he met Jim Craft he was constructing a night club. Now he is ready to believe that he also is a man like Gerry Goff. After the return from Louisville there were approximately nine poker games at the Villardo, conducted on Friday nights. The poker games were like inviting somebody to your house for a game of cards. (Testimony on the poker games was permitted over repeated objection) (A. 91-97). James Weidner's testimony that Kotakes asked him for the approximate sum of $600.00 so that Marian Chadwick could leave with him is not true (A. 98). Never indicated to him any amount of money in regard to Chadwick. Weidner and Chadwick were in love and Weidner is not telling the truth about the $600.00. He never ran them off the place (A. 98-101). Jim Craft asked him who Marian was and he told him, the girl friend of Goff. He didn't tell Jim Craft she was a prostitute. Craft showed interest in her and wanted to go to bed with her and it occurred to him that he wanted her to work for him. He didn't know it to be a fact whether Chadwick was a prostitute at the Villardo or in Louisville. He never had sexual relations with her, nor beat her (A. 101-105).

CLARENCE CAMPBELL testified for Kotakes, as follows: He is the President of Riley Mobile Homes Corporation located at 6718 Melton Road, Portage, Indiana, and met Kotakes about May, 1968, when Kotakes made in-

quiries about the possibility of putting a mobile home sales lot on his property in Gary on the grounds in front of the Villardo Motel. The witness then inspected the grounds and felt that homes could be set up there (A. 107-108).

JOHN MIKU testified for the defendant as follows: He resides at 2717 Locust Street, Portage, Indiana, and between January 6th and January 12, 1968, he was in Louisville, Kentucky, as a road man for the Mobile Homes and so employed for four years and was Safety Patrol man for the whole trailer home manufacturing industry for about twelve or fifteen years prior to that. He saw Kotakes in Louisville and Kotakes inquired of him as to prices and quality of trailer homes (A. 108-109). On cros-examination he testified that the meeting was not pre-arranged. That the conversation took place in the Brown Hotel in Louisville. That he did not see Kotakes at the Holiday Inn but he merely asked him if he could introduce him to some of the manufacturers and the witness said he would if he got a chance since he knows 90% of them. The general public is not admitted at the convention because of the fact of the prices, but a dealer can make a badge for a special party to attend. After the first three days of the convention the public may attend and are actually 50,000 to 60,000 people including men, women and kids. The dealers usually bring their wives and they usually attend functions in the evening (A. 110-112).

Thereafter, by agreement of parties, the reporter read to the jury the stipulation to the effect that Francis Capitelli if called as a witness, would testify that he was a manufacturer of trailer homes; that he saw Kotakes in Louisville, Kentucky between January 6th and January 12th, 1968, and he gave him a pass for the first few days to attend the show (A. 112-113).

REASONS FOR GRANTING THE WRIT

The Courts below have denied the petitioner his right to due process of law and his right to a fair trial as established by the Constitution and interpreted by the decisions of this Court.

1. The trial court erred as a matter of law in denying Kotakes' motion for judgment of acquittal as to Count II notwithstanding the verdict.

On October 15, 1969, Kotakes was charged in a two-count indictment with violations of the Mann Act, 18 U.S.C. §2421. Count I alleged that he transported a woman on January 7th, 1968, from Gary, Indiana to Louisville, Kentucky for the purpose of prostitution. Count II alleged that on January 12, 1968, he transported the same woman from Louisville, Kentucky, back to Gary, Indiana, for the same unlawful purpose.

On February 27, 1970, a jury found Kotakes "not guilty" on Count I and "guilty" on Count II. Subsequently he was sentenced to two years imprisonment.

Marian Chadwick, the woman allegedly involved in the unlawful transportation, was the principal witness testifying for the government. The evidence most favorable to the government discloses that Chadwick before she ever knew Kotakes, was the girl-friend of one Gerry Goff who had forced her to prostitution. According to her, Goff sold her to Kotakes on December 23, 1967 (A. 131-137). Goff rode in the same car with Chadwick on both trips. Kotakes immediately before leaving for Louisville told Chadwick that the purpose of the trip was to engage in

prostitution and in fact Chadwick did engage in acts of prostitution in Louisville and allegedly she gave the proceeds of her trade to Kotakes. No testimony was adduced showing any unlawful purpose of the trip from Louisville back to Gary. Chadwick's testimony brought out the fact that she had also testified, in an earlier trial against Gerry Goff. Her testimony in each trial and on substantially the same points varied considerably and was contradictory (A. 149-150; 152-153; 156-1 ; 161-162; 163-164).

A Samuel Weidner introduced to Chadwick by his brother James Weidner testified, that as good fortune would have it, shortly before going to Louisville to attend the Mobile Home convention, he separated from his wife but continued to live with her and his seven children under the same roof. Further he related of his sudden love for Marian Chadwick and marriage proposal to her. At best his testimony was irrelevant. His further statements that some weeks after his initial encounter with Chadwick in Louisville, he visited her at the Villardo Motel in Gary, and some trivial conversation that he had with Kotakes, have no bearing on the elements of the offense charged and is of little, if any, probative value. Neither did the evidence disclose whether the fascination with Chadwick of this married man, father of nine children and business executive, was possibly due to temporary insanity.

Kotakes testified that in all his life he has been a working man with an exemplary record. As the trial judge pointed out, until a few years ago he lived a useful life and had no indication of criminal activity. (Trial Judge's comments at sentencing, Court Reporter's Record of proceedings on April 10, 1970, Tr. p. 4). He denied Chadwick's testimony. Kotakes' testimony that his purpose in going

to Louisville was his interest in mobile homes was corroborated by two disinterested witnesses, John Miku (A. 108-113), and the stipulated testimony of Francis Capitelli (A. 112-113). It was further substantiated that his interest continued in mobile homes by the testimony of Clarence Campbell, who stated that in May of 1968, Kotakes had contacted him for a survey of the Villardo property in regard to installing mobile homes (A. 107-108). In the spring of 1968, and at a time that Kotakes had no idea whatsoever of being accused of this crime, he employed an attorney and applied for a change of zoning so that he could proceed with the mobile homes (A. 61-65).

In the light of this evidence the jury found the appellant "not guilty" as to Count I of the indictment.

In the landmark case of *Mortensen* v. *United States* (1944), 322 U.S. 369, 64 S.Ct. 1037, this Court, held:

> ". . . The petitioners, man and wife, operated a house of prostitution in Grand Island, Nebraska. In 1940 they planned an automobile trip to Salt Lake City, Utah, in order to visit Mrs. Mortensen's parents. Two girls who were employed by petitioners as prostitutes asked to be taken along for a vacation and the Mortensens agreed to their request. They motored to Yellowstone National Park and then on to Salt Lake City, where they all stayed at a tourist camp for four or five days. They visited Mrs. Mortensen's parents and, in addition, the girls 'went to shows and around in the parks' and saw various other parts of the city. The four of them returned in petitioners' automobile to Grand Island; on arrival they drove immediately to petitioners' house of ill fame and retired to their respective rooms. The following day one of the girls resumed her activities as a prostitute

in petitioners' employ, while the other did not resume such activities for a week or ten days because of illness. Both girls continued to act as prostitutes for petitioners for a year or more after their return from Salt Lake City."

". . . An intention that the women or girls shall engage in the conduct outlawed by §2 must be found to exist before the conclusion of the interstate journey and must be the dominant motive of such interstate movement. And the transportation must be designed to bring about such result. Without that necessary intention and motivation, immoral conduct during or following the journey is insufficient to subject the transporter to the penalties of the Act."

". . . The fact that the two girls actually resumed their immoral practices after their return to Grand Island does not, standing alone, operate to inject a retroactive illegal purpose into the return trip to Grand Island. Nor does it justify an arbitary splitting of the round trip into two parts, so as to permit an inference that the purpose of the drive to Salt Lake City was innocent while the purpose of the homeward journey to Grand Island was criminal."

". . . There is no evidence of any change in the purpose of the trip during its course. If innocent when it began it remained so until it ended."

". . . The outward leg of the trip was interstate transportation. Yet it was not charged, and could not well be, that proof of this part of the trip was a violation of the act. It differed in no respect from the other part, except in the direction of travel. That is not enough to make the first part innocent, the last part illegal."

". . . People not of good moral character, like others, travel from place to place and change their residence. But to say that because they indulge in illegal or im-

moral acts, they travel for that purpose, is to emphasize that which is incidental and ignore what is of primary significance. *Hansen* v. *Haff*, 291 U.S. 563."

"... In short, we perceive no statutory purpose or language which prohibits petitioners under these circumstances from using interstate transportation for a vacation or *for any other innocent purpose.*" (Our emphasis).

The *Mortensen* (Ibid) stands for the proposition that if the interstate travel was innocent when it began, it remained so until ended.

In the present case, if, in a rare moment of compassion, the government at the conclusion of its case had moved to dismiss Count I, the subsequent finding of "guilty" by the jury as to Count II, in the light of *Mortensen,* would have been erroneous as a matter of law. Kotakes respectfully submits that the finding of the jury as to Count I established the propriety of his initial interstate travel and is at least on equal footing with a governmental determination that could have been made as to his lawful initial travel.

Attempts have been made by some Circuits to distinguish the *Mortensen.* Thus, in *United States* v. *Oriolo* (1944), 146 F.2d 152, the Third Circuit states:

"... There is one significant fact which in our opinion, distinguishes the present case from the Mortenson case and presents sufficient evidence to sustain the conviction. That evidence consists of the fact that defendant was arrested and fined in New Jersey and his statement to the woman that she would have to return to Philadelphia and resume the business of prostitution to enable him to pay the fine. As will be noted from the excerpt from the majority opinion of the Supreme Court above quoted, much stress was laid on the fact

that: '*The sole purpose of the journey from beginning to end was to provide innocent recreation and a holiday for petitioners and the two girls.* * * * There is no evidence of any change in the purpose of the trip during its course. If innocent when it began it remained so until it ended.' (Our emphasis).

In the case at bar there was evidence of a change in the purpose of the trip during its course. The seizure of defendant's automobile and the fine imposed upon him supply the motive for the formation of a new intent on his part in transporting the woman to Pennsylvania and his statement to her as to this intent was sufficient to demonstrate that a change had occurred in the purpose of the trip to Philadelphia which distinguished it from being merely the return of the vacation trip.

Accordingly, we conclude that there is evidence in this case, lacking in the Mortensen case, that defendant did transport a woman in interstate commerce ' for the purpose of prostitution or debauchery' within the meaning of the Mann Act.

The judgment of the district court is affirmed."

This Court, however, granted certiorari and reversed, *United States* v. *Oriolo,* 324 U.S. 824.

In *Becker* v. *United States* (1954), 217 F.2d 555, the Court of Appeals for the Eighth Circuit, beginning at page 556, states:

". . . Here the evidence was that Lila Lane obtained employment as an exotic dancer at defendant's hotel and bar room in Medford, Wisconsin through a Minneapolis booking company at a salary of eighty dollars a week with room in the hotel and board. She performed her act there from November 2, 1953, until a few days before Thanksgiving (which fell on November 26). She then made the trip to Minneapolis

for the purpose above stated and when she started from Medford she intended to return to that place. She left her dancing equipment in Medford with another exotic dancer whom defendant employed to carry on in her place. She testified that her dancing contract was not cancelled or terminated and had been extended by her and appellant to a period past Thanksgiving. But there is no evidence that she had a round trip ticket and she was not shown to have set or to have had in mind any date for her return to Medford. When she was in Minneapolis she telephoned the booking agent who had obtained her dancing contract. The agency was entitled to a ten per cent commission on her dance earnings which was paid up to November 28th. The agent testified that she told him that she did not know whether she wanted to go back or was going back at that time or any more. He also said 'that was the termination of our contract so far as our agreement and our contract was concerned, that was its termination.' He also testified that the defendant called him by phone concerning Lila Lane and asked if she was coming back to work. The agent replied 'I didn't know at the time because I hadn't had a definite understanding with Lila whether she was going back or not, she was uncertain herself.' 'So then he (defendant) asked if I could get him somebody else.'

The record then shows that the defendant telephoned Lila Lane at Minneapolis more than once. Though he was married and had two children he made protestations of love and desire for her and 'begged her to come back and said he couldn't live without her, and all that, and that she just had to come back' 'he promised to support both her mother and herself.'

The defendant refrained as he had the right to do from taking the witness stand in his own behalf and the testimony as to his conduct towards Lila Lane after she went back to Medford came mainly from her.

It fully sustained the charge of the indictment as to his purpose and intent in inducing her to make the railroad journey to him in interstate commerce. He paid the cost of her journey on the railroad to Eau Claire and $15.00 for the taxicab from there to Medford.

We hold that the evidence did not establish as a matter of law that Lila Lane returned to Medford from Minneapolis solely in pursuance of the intention to return with which she had started from Medford but that it was for the jury to say whether or not the defendant had knowingly induced her by his persuasions and enticements to go in interstate commerce to Medford for the purposes and with the intent on his part as charged in the indictment. The case presented by the evidence was plainly distinguishable from *Mortensen* v. *U.S.* supra, and the dependent cases." (Our emphasis).

This Court again citing the *Mortensen* granted certiorari and reversed the judgment of conviction, *Becker* v. *U. S.*, 348 U.S. 957, 75 S.Ct. 449.

It is apparent, in view of the *Oriolo* and *Becker* (Ibid) decisions that this Court has not subscribed to a limited interpretation of *Mortensen.* It seems clear that once the innocence or lawfulness of the initial travel in interstate commerce has been established, a conviction for the return trip will not be sustained merely on the basis of narrow interpretation of the *Mortensen* and distinctions such as "innocent recreation and a holiday" of the *Oriolo* (Ibid), or even a jury finding of the existence of the prohibited purposes as was done in the *Becker* case (Ibid).

The trial court, in denying Kotakes' motion for judgment of acquittal as to Count II did in fact rely on such distinctions.

The court states:

> ". . . But this case differs materially from *Ross* and *Mortensen*. In both of those cases, it was conceded that the initial trip was wholly innocent, and that the prostitutes returned to work willingly. Here, however, there was considerable evidence indicating that the trip to Louisville was anything but an innocent vacation, and that the prostitute's return to Gary and subsequent acts of prostitution were under the compulsion of the defendant.
>
> The fact that defendant was acquitted on Count I is irrelevant . . . The verdict of not guilty on Count I is not sufficient to bring this case under the aegis of *Mortensen* and *Ross* . . ." (A. 26-27).

The trial court heavily relies on the fact that in the *Mortensen* case the initial trip was wholly innocent but ignores the fact that the jury did find Kotakes 'not guilty' as to the initial transportation and considers such finding as irrelevant to the question whether or not the initial trip of Kotakes was a lawful one. The only way then, the initial trip could have been an innocent or lawful one, was if the government and only the government had so decided. What if the court itself had sustained Kotakes' motion for judgment of acquittal as to Count I? Could it rationally be argued that such a finding would be "irrelevant" to the question of lawfulness of the initial trip? Kotakes respectfully urges that the lawfulness of his initial travel in interstate commerce has been determined and evidence to the contrary was disbelieved by the Jury. Whether his initial trip to Louisville was an innocent vacation trip or for the purpose to attend a Mobile Home convention is not significant. What is significant is the fact that the jury has forever determined that he did not have the unlawful purpose as charged by the government.

In the *United States* v. *Ross*, (1958) 257 F.2d 293, on two separate week-ends, the defendant accompanied a call girl from New York to an apartment he rented in Newark. At the end of each week-end, he drove her back to New York, where she returned to her regular occupation, with the defendant's knowledge. Counts I and II of the indictment were addressed to the initial trips from New York to Newark. Counts III and IV were based on the return trips. The jury by direction of the trial judge acquitted the defendant on the first two counts, the prosecution consenting thereto because the evidence was insufficient. The jury returned a verdict of guilty on Counts III and IV, but the Court of Appeals reversed, holding that:

> ". . . As Nelda returned to her occupation as soon as appellant drove her from Newark to New York, and as he knew full well that she would do this, one might suppose that the violation of the Mann Act was clearly established. But the Supreme Court in an unbroken line of decisions on the precise point has held that the trip to and from must be taken as a unit. It cannot be split up into two trips. If appellant and Nelda went to Newark for a week-end of recreation, the return trip cannot be separated from but remains an integral part of a single unitary undertaking."

In the *United States* v. *Hon*, 306 F.2d 52, the U. S. Court of Appeals for the Seventh Circuit reversed the conviction where the evidence showed that the trip began in Nevada with sporadic acts of prostitution through several states, and ended in Indiana, but the dominant motive of the interstate travel was not the intention that the woman should be transported for the purpose of prostitution. The Court of Appeals below further restricted the application of *Mortensen* and *Ross* by merely finding that they are limited to their facts, (Appendix A. Dec. pg.

4-5). In support thereof the court cites *Green* v. *United States,* 5th Cir., 372 F.2d 446 (1967); *United States* v. *Bennett,* 4th Cir., 364 F.2d 77 (1966). The *Green* case, (Ibid) stands for the proposition that the Fifth Circuit is not willing and has consistently declined to extend the doctrine of *Mortensen* beyond its facts, contrary to this Court's determination in the *Oriolo* and *Becker* decisions (Ibid). At any rate in the *Green* case, the defendant was found guilty for transporting a woman from Panama City, Florida to Alabama for the avowed purpose of engaging in prostitution while in Alabama. The government did not charge the defendant with unlawful initial transportation from Alabama to Florida, so the only matter presented was whether the defendant had the requisite dominant purpose in transporting the woman from Florida to Alabama. The *Bennett* (Ibid) case has no bearing to this case but it merely touches upon the Fifth Circuit's determination of the statutory "intent and purpose" and the court at footnote 4 states:

> ". . . Some confusion as to the precise nature of the statutory 'intent and purpose' has emanated from the Supreme Court's dictum in *Mortensen* v. *United States,* . . .".

In this case, the crucial point is whether Kotakes' initial travel from Gary to Louisville was for the purpose of transporting Chadwick for prostitution. That question has been answered conclusively by the jury in the negative. It is then inescapable that Kotakes' initial travel was for purposes other than those prohibited by the statute. His return trip to his home and business cannot as a matter of law be considered as being unlawful and his conviction as to Count II of the indictment was erroneous.

2. The court erred in denying Kotakes' motion for acquittal as to Count II of the indictment for insufficiency of proof.

Assuming that *Mortensen* does not apply in this case, and most assuredly Kotakes does not so concede, we then turn to the question of the sufficiency of the evidence to sustain the conviction as to Count II.

The Mann Act does not proscribe acts of prostitution. It rather decrees unlawful that the transporter of a woman in interstate commerce will undertake the journey for the purpose of prostitution. As pointed out in the dissent opinion in the *Hon* case (Ibid), it is the purpose of the transporter and not of the woman transported that is material. We have searched the record and find no evidence whatsoever on which an inference or a finding could be based to the effect that the purpose of Kotakes' return trip from Louisville to Gary was undertaken so that Chadwick would engage in prostitution in Gary. The only testimony in regard to the return trip, was the following:

Q. Did there come a time when you left Louisville?
A. Yes, there was.
Q. When you left Louisville, where did you go?
A. Back to Gary, Indiana, at the Villardo Hotel.
Q. How did you travel?
A. By car, the same way as we went down.
Q. Whose car was it?
A. Ross Kotakes'.
Q. Did Ross Kotakes ride in the automobile with you?
A. Yes.
Q. Did he drive?
A. On and off.
Q. With whom did he share the driving?
A. Gerry Goff.
Q. When you returned to Gary, what did you do?
A. Went to work at the Villardo.

Q. This is the same location that you worked at prior to going to Louisville?
A. Yes, sir.
Q. What did you do there, at the Villardo?
A. Worked as a call girl or as a prostitute.
Q. Did you receive proceeds for sexual intercourse?
A. Yes, sir.
Q. What did you do with the funds?
A. Gave the money to Ross." (A. 129-130).

The government made no attempt to introduce any evidence that might have tended to establish the requisite unlawful purpose of Kotakes existing at the time or before he commenced his return trip from Louisville to Gary. The prosecution was aware of such requirement and in fact did so inquire as to the initial trip from Gary to Louisville, (A. 127).

At best, the evidence in regard to Count II, only sustains the fact that Kotakes left Louisville for Gary and that Chadwick rode in the same automobile with him as well as Gerry Goff.

Chadwick's testimony that upon reaching Gary, she engaged in acts of prostitution and gave the proceeds to Kotakes is totally irrelevant. In the *Mortensen* case, it was conceded that one of the prostitutes accompanying the defendants on the return trip to the point of origin, resumed her prostitution activities immediately upon her return in the house operated by the defendants. That fact was not considered important by this Court. The fact, if it be a fact, that Chadwick engaged in acts of prostitution in Gary and upon her return from Louisville cannot as a matter of law have any significance in this case.

In the case of *John Hohenadel Brewery Co.* v. *United States,* (C.C.A.) 295 F. 489, the court stated:

> "The brewing company contends that the verdict of guilty on the seventh count cannot stand in the face of the verdict of not guilty on the other counts. If the government relies upon the facts charged in the other counts to sustain the verdict of guilty on the seventh count, the judgment cannot stand, for the jury has found as a fact that the company did not commit the acts therein charged and in that case, the verdict, as defendant contends, would be 'inexplicable and inconsistent.' Facts that have no legal existence may not support a verdict. The verdict of guilty on the seventh count must be based on evidence other than that pleaded in support of the first six counts."

In *Dunn* v. *U. S.,* (1932) 284 U.S. 390, Justice Holmes speaking for the Court commencing at page 402, states:

> ". . . Where there is a verdict of not guilty on one count and a verdict of guilty on another and the former necessarily determines that the evidence failed to establish a fact which is an essential ingredient of the offense charged in the other count, then in determining whether the evidence was sufficient to sustain the finding of guilt the court must exclude from consideration the fact so found in favor of the accused. And so in every such case the question of law for the court always is whether, outside the fact eliminated by the verdict of not guilty, the evidence was sufficient to warrant the conviction . . ." (Citing *Hohenadel,* Ibid).

Beginning at page 406, the Justice concludes:

> ". . . I am of opinion that authorities establish as well-settled: (1) That when upon an indictment charging the same offense in different counts, the jury acquits as to one and convicts on the other defendant is entitled to a new trial; and (2) That, when different crimes are charged in separate counts and the jury

acquits as to one and convicts on the other, the conviction will be sustained unless, excluding the facts which the jury in reaching its verdict of acquittal necessarily found not proved, it must be held as a matter of law that there is not sufficient evidence to warrant the verdict of guilty, and, where that evidence outside the facts so conclusively negatived by the acquittal on one count is not sufficient to sustain guilt on the other count, defendant is entitled to new trial . . .".

In this case, the trial court in its memorandum to the order denying Kotakes' motion for judgment of acquittal notwithstanding the verdict, states:

". . . But this case differs materially from *Ross* and *Mortensen.* In both of those cases, it was conceded that the initial trip was wholly innocent, and that the prostitutes returned to work willingly. *Here, however, there was considerable evidence indicating that the trip to Louisville was anything but an innocent vacation, and that the prostitute's return to Gary and subsequent acts of prostitution were under the compulsion of the defendant.* (Our emphasis).

The fact that defendant was acquitted on Count I is irrelevant. The acquittal could have been for any of a number of reasons, none of which compel the conclusion that the Louisville episode was an innocent vacation trip, or that the prostitute's return to Gary was voluntary. To give just one example, the jury might have concluded from the evidence that on the trip down the prostitute was acting independently, or under the control of Gerald Goff, another occupant of the same car; but that on the trip back to Gary she was under the control of the defendant. The verdict of not guilty on Count I is not sufficient to bring this case under the aegis of *Mortensen* and *Ross.* In short, there was ample evidence to justify the conclusion that the trip back to Gary was exactly what Congress was attempting to eliminate with the White

> Slave Traffic Act: The use of interstate commerce to compel a woman against her will to continue in a life of prostitution. See *Mortensen,* 322 U.S. at 377. The conviction stands." (A. 26-27).

It is apparent that the trial court relied heavily on the government's evidence in regard to the initial interstate travel from Gary to Louisville, not only in an attempt to distinguish this case from the *Mortensen* but for the further purpose of using the evidence directed to Count I to sustain conviction for Count II. In the light of the *Dunn* case (Ibid) all evidence adduced in this trial in regard to Count I is legally non-existent, and the conviction as to Count II can only be sustained if the remaining evidence tends and is sufficient to prove the crime charged.

For the foregoing reasons the verdict as to Count II was not supported by sufficient evidence.

CONCLUSION

For the foregoing reasons the petitioner respectfully submits that this petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOHN KAPPOS
Chapel Square, Suite 116
7863 Broadway
Gary, Indiana 46410
Attorney for Petitioner

APPENDIX

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1970—JANUARY SESSION, 1971

No. 18489

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROSS KOTAKES,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

MARCH 11, 1971

Before HASTINGS, *Senior Circuit Judge*, and CUMMINGS and KERNER, *Circuit Judges.*

HASTINGS, *Senior Circuit Judge.* Defendant Ross Kotakes was charged in a two-count indictment with violations of the Mann Act, Title 18, U.S.C.A. § 2421[1]. In

[1] "§ 2421. Transportation generally

"Whoever knowingly transports in interstate * * * commerce, * * * any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, * * *—

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Count I, defendant was charged with knowingly transporting in interstate commerce on January 7, 1968, from Gary, Indiana to Louisville, Kentucky, a woman for the purpose of prostitution, debauchery and other immoral purposes. In Count II, defendant was charged with transporting the same woman back from Louisville to Gary on January 12, 1968, for the same unlawful purposes.

Following a jury trial, defendant was found not guilty on Count I and guilty on Count II. The trial court denied defendant's motion for acquittal on Count II, notwithstanding the jury verdict. Defendant was sentenced to imprisonment for two years[2] on judgment of conviction of Count II. He now appeals such judgment and sentence. We affirm.

Grounds asserted for reversal are (1) insufficiency of the evidence to sustain the verdict; (2) invalidity of the verdict as a matter of law; (3) erroneous instructions; and (4) unreasonable delay in commencement of the prosecution.

We have read the entire transcript of the testimony in the trial of this cause in order to determine whether the jury verdict of not guilty under Count I of the indictment, as a matter of law, precludes a guilty verdict under Count II. The district court, in a memorandum opinion, reviewed this question and denied defendant's motion for acquittal notwithstanding the verdict. We agree.

We need not outline the evidence in great detail. Viewing the evidence in the light most favorable to the Government, the jury would have been justified in finding the following narrative established beyond a reasonable doubt.

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[2] The maximum sentence of two years was to be served with defendant eligible for parole at such time as the board of parole may determine. 18 U.S.C.A. § 4208(a)(2).

An 18 year old girl, Marian Chadwick, was transported from Michigan to Gary, Indiana by one Goff in December, 1967, for the purpose of prostitution. Defendant was the owner and operator of the Villardo Hotel in Gary. Goff first had Marian work for him as a prostitute at the Venus Cafe in Gary. She paid over to Goff all of the cash proceeds from her work. About December 23, 1969, Goff registered at the Villardo Hotel and took her with him for the same purpose. Goff had two other prostitutes working there for him, Ruth and Dee Dee. On coming to the Villardo Hotel, for a valuable money consideration paid to him by defendant, Goff transferred his working interest in Marian to defendant. At this time, defendant was living with his prostitute girl friend, Tina, at the Villardo Hotel. Defendant took Tina and Marian on a Christmas vacation trip to Las Vegas, Nevada. On their return, defendant had Marian working for him as a prostitute in the Villardo and took all of her earnings from this activity.

About January 7, 1968, defendant and Goff took their respective prostitutes to Louisville, Kentucky, for the sole and express purpose of working as prostitutes there during a Mobile Home Show convention. Defendant drove his Cadillac from Gary to Louisville and transported with him Tina and Marian, together with Goff and his call girls, Ruth and Dee Dee, and a gambler friend of defendant, John Montagano. The three men rode in the front seat and the four girls in the rear seat. Upon arrival in Louisville, defendant registered at a Holiday Inn motel for a room for himself and his two prostitutes. Goff did the same, and Montagano for himself. All of them were there until January 12, 1968. While there the prostitutes stayed at the motel and were engaged solely in plying their trade, paying their earnings to either defendant or Goff. Defendant paid all expenses for Marian

on the trip to Louisville and while in Louisville. During his stay in Louisville, defendant spent some time at the Mobile Home Show and had some future interest in engaging in that business. The record is quite clear that Marian made the trip solely for the purpose of engaging in prostitution and not for vacation or other personal reasons.

On January 12, 1968, defendant drove the same party of seven persons from Louisville back to Gary and paid Marian's expenses. This return trip was made by defendant for the sole and express purpose of having Marian engage in prostitution at the Villardo Hotel in Gary, which she did along with the other girls, paying her earnings to defendant. This continued until about February 14, 1968 when, for a valuable money consideration, defendant transferred Marian and her services to a third "pimp", one James Craft, and she left the Villardo with Craft. We see no need to detail certain corroborating evidence of the activities in Louisville and Gary.

Defendant testified in his own behalf and freely acknowledged Marian's work as a prostitute in Gary and Louisville, but denied that she ever worked for him or gave him her earnings as his prostitute. He testified and contended throughout the trial that his trip to Louisville was concerned solely with his interest in the Mobile Home Show. He denied that he paid Goff anything for Marian's services or that Craft paid him anything for them. In short, defendant testified that Marian's activities were voluntary on her part and that she either kept her earnings or paid them to someone else.

It becomes apparent that the jury exercised its prerogative and discredited defendant's testimony essential to establishing his defense to the charge in Count II. Credibility evaluations and determinations lie within the province of the trier of fact, the jury in this case.

Defendant urges reversal upon the holdings in *Mortensen* v. *United States,* 322 U.S. 369 (1944) and *United States* v. *Ross,* 2 Cir., 257 F. 2d 292 (1958). Such reliance is misplaced because each case is readily distinguishable on its facts.

In *Mortensen,* petitioners, a man and wife, operated a house of prostitution in Nebraska. They took two girls, who had been living at their house as prostitutes, with them on a trip to Utah, which was planned and consummated purely as a vacation. Upon their return, the girls resumed prostitution at petitioners' house. The Court, in reversing the judgment of conviction, stated at page 377: "To punish those who transport inmates of a house of prostitution on an innocent vacation trip in no way related to the practice of their commercial vice is consistent neither with the purpose nor with the language of the Act." The Court held that a conviction of petitioners for transporting the girls from Utah to Nebraska, the return trip, for the purpose of prostitution or debauchery, in violation of § 2 (§2421, *supra*) of the Mann Act, was not supported by any relevant evidence.

In *Ross,* defendant transported a prostitute from New York to New Jersey for a weekend of recreation and while there she did not engage in professional activities. Defendant then returned her from New Jersey to New York where she resumed her work as a prostitute. A conviction of defendant for a § 2421 violation of the Mann Act was reversed on the authority of *Mortensen.*

In our judgment, these two cases are limited to their facts and are inapposite here. See, *United States* v. *Eddington,* 7 Cir., 328 F.2d 760, 763 (1964); *United States* v. *Nichol,* 7 Cir., 323 F. 2d 633, 634 (1963); *Dunn* v. *United States,* 5 Cir., 318 F. 2d 89, 92 (1963). In the case at bar, as the district court observed in denying the motion for acquittal notwithstanding the verdict, there was considerable evidence indicating that the trip to Louisville was

anything but an innocent vacation, and that the prostitute's return to Gary and subsequent acts of prostitution were under the compulsion of the defendant." We agree. See, *Green* v. *United States,* 5 Cir., 372 F. 2d 446 (1967); *United States* v. *Bennett,* 4 Cir., 364 F. 2d 77 (1966).

Why the jury found defendant not guilty on Count I is immaterial and irrelevant and any answer to this question would be pure speculation. We need not hazard a guess on what was in the minds of the jurors, however interesting such speculation might prove.

With further reference to defendant's claim that his trip to Louisville was for mobile home business purposes, it is well settled that to sustain a conviction under the Mann Act it is not necessary that the sole purpose of the transportation be for immoral purposes, it being sufficient if it was a dominant or an efficient and compelling purpose. *Forrest* v. *United States,* 5 Cir., 363 F. 2d 348, 349-351 (1966), and cases therein cited.

In view of the foregoing, we conclude and hold that the evidence here was sufficient to sustain the conviction under Count II of the indictment, and that such conviction was valid as a matter of law.

Defendant charges the trial court erred in giving to the jury, over objection, the court's instruction No. 17 and in modifying defendant's tendered instruction No. 5. The court's instruction No. 17[3], as set out in the margin, is a

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[3] "Court's Instruction No. 17

"If you find from the evidence, beyond a reasonable doubt, that the defendant had two purposes in traveling in interstate commerce, one of which was legal and one of which was illegal, the fact that one purpose was legal would be no defense to the illegal purpose. If, on the other hand, you find that the defendant had only one dominant purpose, and that purpose was legal, then you must find him not guilty."

correct statement of the law concerning the dominant purpose doctrine consistent with this opinion. The modification of defendant's instruction No. 5 was merely the addition of the words "with its own illegal purpose" and was a proper clarification of the tendered instruction.[4] No authority is cited by defendant and we find no error in giving either of these instructions. Reading the instructions as a whole reveals that the jury was fully and properly instructed in this case.

Finally, defendant charges that the trial court prejudicially erred in denying his motion to dismiss the indictment because of the Government's unreasonable delay in commencing this prosecution. Although not cited by defendant, the motion is obviously grounded on Rule 48(b), Federal Rules of Criminal Procedure, Title 18, U.S.C.A.[5] Defendant asserts the alleged violation occurred in January, 1968 and that the indictment was not filed until October 15, 1969. He argues this delay of 21 months was clearly prejudicial. The trial court held a preliminary

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[4] "Defendant's Instruction #5.

"If you find from the evidence that the trip from Louisville, Kentucky to Gary, Indiana was not a distinct enterprise **with its own illegal purpose**, but rather a return transportation to the point of origin, that is to say, Gary, Indiana, then you must find the defendant not guilty as to ["that count," deleted] **Count II**." (Words in italics and modification of last two words were added by the trial court.)

[5] "Rule 48. Dismissal

* * *

"(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

hearing on the motion to dismiss, filed a memorandum decision and denied the motion. A transcript of the hearing is not in the record before us on appeal. We have carefully reviewed the meticulous detail of the circumstances surrounding the investigation of this violation and the resulting delay until the October, 1969 session of the grand jury, as outlined by the learned trial court in its memorandum. We agree with the court that there was no showing the Government's delay was "unnecessary" and that defendant made no adequate showing of resulting prejudice. *United States* v. *Hauff,* 7 Cir., 395 F. 2d 555 (1968); *United States* v. *Deloney,* 7 Cir., 389 F. 2d 324 (1968). We find Senior Circuit Judge Duffy's reasoning in *Hauff* and *Deloney* and the rule announced there to be controlling. See, *United States* v. *Fay,* 2 Cir., 313 F. 2d 620, 623 (1963); *Harlow* v. *United States,* 5 Cir., 301 F. 2d 361, 366 (1962). We hold the trial court did not err in denying the motion to dismiss.

For the foregoing reasons, the judgment of conviction and sentence on appeal will be affirmed.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

Tuesday, April 6, 1971

Before

Hon. JOHN S. HASTINGS, *Senior Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. OTTO KERNER, *Circuit Judge*

No. 18489

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ROSS KOTAKES,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

It Is Ordered by the Court that the petition for rehearing filed in the above-entitled cause be, and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1629

ROSS KOTAKES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In a two-count indictment filed in the United States District Court for the Northern District of Indiana, petitioner was charged with knowingly transporting one Marian Chadwick from Gary, Indiana, to Louisville, Kentucky, for purposes of prostitution on January 7, 1968 (count 1), and with transporting the same woman from Louisville back to Gary for the same unlawful purpose on January 12, 1968 (count 2), in violation of the Mann Act, 18 U.S.C. 2421. After a jury trial, petitioner was acquitted on count 1 and convicted on count 2. He was sentenced to two years' imprisonment, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed (Pet. App. A).

425-976—71

Petitioner argues here that he is entitled to acquittal as a matter of law (Pet. 20–30). He asserts that the count 2 transportation back from Louisville to Gary must be deemed merely a return journey, and that the jury's acquittal on count 1 bars his conviction on count 2 under *Mortensen* v. *United States,* 322 U.S. 369. The facts of this case (see Pet. App. 2–6), however, distinguish it from *Mortensen.* Under the evidence the jury could infer that Miss Chadwick did not voluntarily travel with petitioner, but rather was compelled to do so. Thus, even if petitioner made the count 1 trip without the requisite unlawful purpose, the return (count 2) trip was separate. The evidence indicates that petitioner returned Miss Chadwick to Gary, not simply to bring her home, but because he intended to have her available to work as a prostitute for him there—the statutorily proscribed purpose. This was not an innocent vacation trip, as in *Mortensen.*

Petitioner further claims that his acquittal on count 1 rendered insufficient the proof of his guilt under count 2 (Pet. 31–35). But in this case the indictment charged two different offenses as to which the evidence differed. Thus the acquittal on count 1 did not, as petitioner contends, involve facts essential to the count 2 conviction. Moreover, even if the verdicts here are inconsistent, the count 2 conviction should be sustained where, as in this case, sufficient evidence supports it; the inconsistency is deemed to result from the exercise by the jury of its historic power of lenity. *Dunn* v. *United States,* 284 U.S.

390;[1] *United States* v. *Carbone,* 378 F. 2d 420, 422–423 (C.A. 2), certiorari denied, 389 U.S. 914; see also *United States* v. *Dotterweich,* 320 U.S. 277, 279.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

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[1] Petitioner quotes the *Dunn* opinion to the opposite effect (Pet. 33–34), representing that the quotation is from "Justice Holmes speaking for the Court." In fact the quotations are from the dissenting opinion of Mr. Justice Butler. Mr. Justice Holmes wrote the majority opinion, which holds that an inconsistent jury verdict does not require acquittal.

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No. 1629

In the Supreme Court of the United States

OCTOBER TERM, 1970

ROSS KOTAKES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER

JOHN KAPPOS
Chapel Square, Suite 116
7863 Broadway
Gary, Indiana 46410
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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REPLY BRIEF FOR PETITIONER

Petitioner submits that footnote 1 of Government's Memorandum in opposition of his petition for certiorari is correct.

Counsel for the petitioner respectfully begs the Court's and the Solicitor General's pardon for his inadvertence and unintentional error.

Respectfully submitted,

JOHN KAPPOS
Attorney for Petitioner